

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

ALTON COLES a/k/a NASEEM COLES,  
et al.,

Defendant.

Philadelphia, PA  
CR-05-440

February 29, 2008

FILED  
FEB 21 2008

MICHAEL J. BRESNICK, Clerk  
By [Signature] Dep. Clerk

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE R. BARCLAY SURRECK  
UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded by electronic sound recording; transcript  
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I N D E X

PAGE

Jury Question #1

4

## Colloquy

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(Court in Session)

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THE COURT: Okay. Counsel, you have taken a look at the question. I'll hear whatever input you want to give.

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Mr. Lloret?

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MR. LLORET: Certainly, Your Honor. Your Honor, I think that the -- in reviewing the question, it really boils down to an analysis of the statutory language.

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Sort of going back to first principles, the statute, 848 Section C which defines a continuing criminal enterprise, part 2A says that the violation is part of a continuing series of violations, and in the relevant section, it says --

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"...which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management."

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In looking at the question, Your Honor, it seems that the jury is parsing this as does each defendant need to have been found to have individually managed, organized, or supervised five or more people. I believe that their focus is a little off and needs to be corrected.

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The focus is whether the person occupies a position, not whether the person hands-on manages somebody or doesn't manage somebody. So for instance, Your Honor, in posit a organization where a -- a sophisticated drug dealer has only

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1 three close confidants that he actually does hand-to-hand  
2 contact with and the rest of the organization really doesn't  
3 know him or doesn't get involved with him, nevertheless, he can  
4 occupy a position of management, supervisory position or  
5 organizational position with respect to a large number of  
6 individuals, certainly in excess of five.

7 A similar kind of analysis is at hand when one talks  
8 about dominion and control, that possession doesn't require  
9 that somebody have the gun in their pocket if they exercised  
10 dominion and control, that is, they have the capacity -- the  
11 capacity to exercise that organizational, managerial, or  
12 supervisory control.

13 So in this -- in this situation in response to this,  
14 I suggest, Your Honor, that the jury be carefully instructed  
15 again about the statutory language, that it is the -- the  
16 crucial distinction, the crucial issue is whether the person  
17 occupies a position of organized or supervisory position or any  
18 other position of management, and particularly, whether they  
19 have the capacity to do the things that one ordinarily  
20 associates with an organizer, a supervisor, or management, not  
21 whether they have, for instance -- and I don't know that  
22 specific examples are necessary, but the contrast is often  
23 somewhat troublesome, because you start getting into details,  
24 but I think that's where they have to be refocused.

25 It's certainly the case that each defendant's

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1 culpability has to be evaluated as to each defendant. There is  
2 no question of that, and I think where they underline the word  
3 each, they can be reassured that each defendant has to be  
4 evaluated, but I think they've gotten a little off track in --  
5 in the way they're phrasing the last sort of part of that  
6 question and they need to be refocused on the statutory  
7 language. Thank you, Your Honor.

8 MR. WARREN: Judge, I think the answer to this  
9 question, I kind of vacillated, went back and forth, but I  
10 think the answer to this question is found in the charge you  
11 recently read to the jury where you say the phrase in concert  
12 with five or more persons means some type of agreement or joint  
13 action, whether direct or indirect, with at least five other  
14 persons. So you've got to have an agreement with at least five  
15 other persons. It doesn't have to be at the same time, but you  
16 have to have an agreement with at least five other persons  
17 during the time period that the continuing criminal enterprise  
18 was acting.

19 And then the last sentence in the second paragraph on  
20 that in concert was the section that says the Government is not  
21 required to prove that the defendant managed, supervised, or  
22 organized these five or more persons at the same time. I think  
23 the converse of that is that the defendant in order to be  
24 convicted of this statute, you have to have an agreement with  
25 at least five other people, direct or indirect, I think the



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1 language that they're talking about in their question focuses  
2 upon that direct or indirect language in this charge, and I  
3 think that's a reference to proof of the agreement. Joint  
4 action or the agreement can be proved either directly or  
5 indirectly, but I think you do have to exercise managerial,  
6 supervisory, or organizational control over five or more  
7 individuals. Now, they don't have to be the same five at any  
8 given point in time.

9 THE COURT: Well, the jury has asked whether you have  
10 to individually manage, organize, or supervise five or more  
11 people.

12 MR. WARREN: I think so. I think yes. I think what  
13 differentiates a -- what differentiates an ordinary member of a  
14 conspiracy from a drug kingpin as the statute is  
15 euphemistically referred to is that you do exercise  
16 organization, and it can be more than one individual as we  
17 charge the jury, but I think in order to convict either  
18 Mr. Coles or Mr. Baukman, they would have to find that each  
19 individual defendant exercised organization, managerial, or  
20 supervisory control over four -- five or more individuals.  
21 That would be my position.

22 THE COURT: Mr. Lloret, what is your response to  
23 that?

24 MR. LLORET: I think, you know, not to -- not to  
25 quibble, but I think in this instance, a careful reading is

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1 appropriate. When Mr. Warren says to exercise, again, I have  
2 to look back at the statute, and I have to say -- and let me --  
3 the Court's charge is instructive, Your Honor. There is a  
4 couple of things that are instructive that have already been  
5 charged, and I think correctly.

6 First, the element itself, Your Honor, doesn't speak  
7 of exercise. It -- it says fourth, that the defendant occupies  
8 the position of an organizer -- and this is at page 41 of the  
9 Court's -- well, this is the draft instruction, Your Honor, but  
10 this is the elements of CCE. It says occupied a position of an  
11 organizer, supervisor, or manager.

12 Now, the question of whether a conspiracy exists I  
13 think is a separate element. I mean, the -- the question of  
14 whether there is a -- an agreement with five or more persons,  
15 yes, there does have to be five or more people involved, but  
16 the specific element that we're talking about, Your Honor, and  
17 I think the jury is very focused on this and they indicate that  
18 they're focused on it is whether he occupies a position.

19 So it doesn't say in the statute, it doesn't say in  
20 the instruction that someone exercised, and that's not the verb  
21 that's used. So I think it would be slightly misleading to  
22 tell the jury that one has to exercise.

23 I think we are safest when we use the statutory  
24 language and reemphasize that that is what they have to find,  
25 that they occupied a position.



## Colloquy

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1 Now, with respect to explaining that, I think the  
2 Court really has in many -- in many instances, for instance,  
3 where it says means some type of agreement or joint action,  
4 whether direct or indirect, it certainly suggests in that and  
5 certainly can be clarified for them that the occupy a position  
6 does not have to be direct. It can be direct or indirect, that  
7 is, the agreement can be direct or indirect with five or more  
8 other persons, and I think it's clear under some of the  
9 examples that I've given that the occupancy of a position of an  
10 organizer, supervisor, or manager does not require that a  
11 defendant directly manage five people in the active sense. He  
12 can occupy a position, and that's -- that's my point,  
13 Your Honor. I think it's an important one here.

14 THE COURT: If the individual supervises or manages  
15 or organizes several people who in turn organize others, then  
16 the fact that there has been that kind of a delegation of  
17 authority doesn't preclude a finding of -- I think that's where  
18 this jury is focusing. They're trying to determine whether you  
19 have to have actually managed or organized one, two, three,  
20 four people, and they're trying to figure out who they were.

21 MR. LLORET: Exactly, Your Honor. I think that is,  
22 and that's why I say -- and this -- this sounds like a fine  
23 philosophical point, but, Your Honor, sometimes fine  
24 philosophical points intersect with the law. This is such an  
25 occasion.

## Colloquy

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1           They're really -- they're veering off into active  
2           verbs, and they're saying does somebody have to manage,  
3           supervise, or organize five or more people. Your Honor, that  
4           would be sufficient for a finding under the statute; that is,  
5           if they found that, it would be sufficient, but I say,  
6           Your Honor, it's not necessarily. That is, there can be the  
7           situation that Your Honor posits where there is indirect --

8           THE COURT: Well --

9           MR. LLORET: -- supervisory position.

10          THE COURT: -- so isn't an appropriate response to  
11          this the answer the question is yes, however, you can supervise  
12          three or more persons who may in turn supervise the activities  
13          of others and still be found to have supervised five or more  
14          people.

15          MR. WARREN: Judge, I would --

16          THE COURT: The fact that there is a delegation of  
17          responsibility doesn't detract from that.

18          MR. WARREN: Well --

19          MR. LLORET: That is true, Your Honor, but I think  
20          there -- it's not just delegation that -- I think it is --  
21          delegation is sort of a counter example to the sort of direct  
22          supervision model, which is clearly not -- it's one part of  
23          what can be liability, but it's not the whole scope.

24          There is the direct supervision. There is the  
25          delegation situation, but there is also, Your Honor, I think --

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1 and this is why I'm so insistent about the actual language of  
2 the statute being reemphasized to them. The statute does not  
3 make it -- it does not prescribe managing, supervising, or  
4 controlling or organizing. What it says is that the person has  
5 to occupy a position, and I think the safest way to instruct  
6 the jury so that it's -- it's a clear -- and it clearly  
7 complies with the -- the statute and with the Third Circuit  
8 case law and other case law is that the person -- you must find  
9 that the person occupies a position of supervisory management,  
10 managerial, or -- well, I think the language, it's  
11 organization, supervisory, or managerial position under the  
12 statute, and that is because in this case, it may be -- and the  
13 facts may -- may convince the jury that Tim Baukman was every  
14 bit a co-partner with Alton Coles but was not as actively  
15 involved in the day-to-day talking on the phone with ten  
16 people.

17 Now, it seems to me, Your Honor, that under the case  
18 law and under the statute in particular, if they find that Tim  
19 Baukman occupied a position of management, supervision, or --  
20 or organization as a co-equal with Alton Coles, they can  
21 legitimately find that it was with respect to five or more  
22 persons without finding that Tim Baukman was on the phone  
23 telling Hakiem Johnson what to do or so and so what to do.

24 So I -- I stress, Your Honor, that I think the safest  
25 course in this is to utilize somehow in the instruction the

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1 actual statutory prohibition, which is on occupying a position.  
2 Thank you, Your Honor.

3 THE COURT: All right.

4 MR. WARREN: Judge, I would point out the first time  
5 the jury asked this question, here is what you told them. The  
6 Government need not establish that the defendant managed five  
7 people at once, that the five acted in concert with each other,  
8 that the defendant exercised -- that's where the exercise  
9 language is coming from, a supplemental charge we've given them  
10 -- exercised the same kind of control over each of the five or  
11 even that the defendant had personal contact with each of the  
12 five.

13 I mean, that talks about individual exercise, I mean,  
14 and this language came directly from a Third Circuit case, as I  
15 recall.

16 THE COURT: It seems to me that it may be prudent to  
17 repeat that same language.

18 MR. LLORET: I think it may, Your Honor. I just --  
19 my only caveat is that I think one always tries to speculate  
20 what the Third Circuit may view a thing, but I think when in  
21 doubt, the statutory language, if one includes that, it's  
22 always safest, because from -- from an Appellate standpoint,  
23 whatever the jury's verdict, if the statutory language is  
24 employed with explanatory material that's not contradictory to  
25 the statutory language, I think that's the safest.

Colloquy

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1 THE COURT: All right.

2 MR. LLORET: Thank you.

3 MR. WARREN: Judge, I would quickly point out the  
4 statutory language which Mr. Lloret repeatedly refers says,  
5 subsection A --

6 "...which are undertaken by such person in concert  
7 with five or more persons with respect to whom such  
8 person occupies a position of organizer, supervisor,  
9 or management."

10 The organizer, supervisor, or management language  
11 modifies or refers back to the five individuals with respect to  
12 whom you have to -- I'd say it's exercise, you have to exercise  
13 that sort of control.

14 So that's -- I believe that's Mr. Baukman's position  
15 as well.

16 MS. CHERNIACK: Yes, it is, Your Honor. Emily  
17 Cherniack for Mr. McMahon for Mr. Baukman.

18 MR. LLORET: Your Honor --

19 THE COURT: Go ahead.

20 MR. LLORET: -- I will only respond to say that I  
21 don't think that my hypothetical is -- is ill-advised in this  
22 context. That is, if Ray Crock from McDonalds doesn't know if  
23 the guy flipping furthers at the McDonalds in Cleveland, Ohio,  
24 he still -- and has never talked to him and has no idea of his  
25 existence frankly other than as a general way that there is

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1 somebody out there, Ray Crock is still occupying a position,  
2 and the fact that he's never talked to the burger flipper in  
3 Cleveland is irrelevant.

4 THE COURT: All right.

5 MR. LLORET: Thank you, Your Honor.

6 MR. WARREN: But then how then do you reconcile that  
7 with us telling the jury last time defendant exerted some type  
8 of influence over another individual as exemplified by that  
9 individual's compliance with the defendant's directions,  
10 instructions, occurrence.

11 THE COURT: All right. Counsel, I'm going to take a  
12 couple of minutes to incorporate what you've said. We'll be  
13 back. We'll charge the jury. We told them that they were  
14 going to be able to go home early today. So we will probably  
15 give them the instructions and then let them go for the day.

16 MR. LLORET: Very well, Your Honor.

17 MR. WARREN: Does that mean we get to go too, Judge?

18 MR. LLORET: No. No, Mr. Warren.

19 MR. WARREN: We're going to say here and debate this  
20 point?

21 (Recess)

22 THE CLERK: Please rise.

23 (Jury in)

24 THE COURT: Okay. Ladies and gentlemen, have a seat.  
25 Members of the jury, you have sent a question out with regard

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1 to Count Two of the indictment that charges engaging in a  
2 continuing criminal enterprise.

3 In response to your question, you should understand  
4 that under the statute, the statutory provision, a person is  
5 engaged in a continuing criminal enterprise if that person  
6 violates the provisions of the Federal narcotics laws and such  
7 violations are part of a continuing series of violations of the  
8 Federal narcotics laws which are undertaken by that person in  
9 concert with five or more other persons with respect to whom  
10 such person occupies a position of organizer, supervisory  
11 position or any other position of management and from which  
12 such person obtains substantial income or resources. That is  
13 the definition of the crime. Those are the elements.

14 Now, I told you yesterday that the term organizer,  
15 supervisor, manager, that -- that term is given its ordinary  
16 meaning, and it's irrelevant that other persons may have  
17 exercised supervision superior to the defendant's supervision.

18 I also told you that the Government need not  
19 establish that the defendant managed five or more people at  
20 once, that the five acted in concert with each other, that the  
21 defendant exercised the same kind of control over each of the  
22 five, or even that the defendant had personal contact with each  
23 of the five. In essence, the management element is established  
24 by demonstrating that the defendant exerted some type of  
25 influence over another individual as exemplified by that



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1 individual's compliance with the defendant's directions or  
2 instructions or terms.

3 Now, you have asked me where more than one defendant  
4 is charged in engaging in a continuing criminal enterprise,  
5 does each defendant need to have been found to have  
6 individually managed or organized or supervised five or more  
7 people. Ladies and gentlemen, you should understand that a  
8 defendant who supervises three persons who in turn supervised  
9 the activities of several others can be found to have  
10 supervised and managed five or more persons. The mere  
11 delegation of authority does not detract from the defendant's  
12 ultimate status as an organizer or supervisor.

13 A defendant need not be the only manager, supervisor,  
14 or organizer or even the dominant manager, supervisor, or  
15 organizer. In fact, ladies and gentlemen, a co-defendant can  
16 also be a co-manager and still be included as one of the five  
17 with whom the defendant holds a supervisory position.

18 Now, ladies and gentlemen, I hope that answers your  
19 question. If it does not answer your question, then I will  
20 attempt to give you further instructions, but I think that that  
21 may go to what you were trying to get to in your inquiry to the  
22 Court. If I am incorrect, write down your specific inquiry  
23 then and I will deal with it. Okay?

24 Now, you requested yesterday that you be excused at  
25 four o'clock, and I told you yesterday that I would honor that

## Colloquy

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1 request. Mr. Finney, will you bring the alternate jurors out?  
2 We will excuse the jurors until Monday.

3 THE CLERK: Please rise.

4 (Alternate Jurors Enter)

5 THE COURT: Okay. Have a seat. Okay. Again, I'm  
6 going to caution you. You've been deliberating in this case  
7 now since Monday and you've been talking together about this  
8 matter, but again, I caution you, when you leave here, you're  
9 going to be away from the courthouse over the weekend. We  
10 don't want you discussing the case with anyone, and we don't  
11 want anyone discussing the case with you, and that means  
12 anyone, ladies and gentlemen. Don't talk to friends. Don't  
13 talk to family about this matter. Don't -- if you are with  
14 each other for any period of time, don't discuss the case among  
15 yourselves. In other words, ladies and gentlemen, do not talk  
16 about this case at all over the weekend with anyone anywhere.

17 Don't do any investigation. Don't read anything  
18 about the case. There may be something in the newspapers.  
19 Don't read it. Don't listen to anything should there be  
20 anything on the news. You're going to be away from the  
21 courthouse for quite a while, and I don't want you to forget  
22 these instructions.

23 So with that, the alternate jurors are invited back  
24 on Monday. The 12 original jurors, when you come back, go  
25 directly into the jury room. When all 12 of you are there,

Colloquy

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1 then you can begin and continue your deliberations, and the  
2 alternate jurors will go to the jury room that you have been in  
3 for the last four days, and if necessary, we will press you  
4 into service. All right?

5 Counsel, we'll see you at 9:15 on Monday.

6 (Court Adjourned)

7 \* \* \* \* \*

8 C E R T I F I C A T I O N

9 I, Maureen Emmons, court approved transcriber,  
10 certify that the foregoing is a correct transcript from the  
11 official electronic sound recording of the proceedings in the  
12 above-entitled matter.

13  
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